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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JAN 17 1986

OFFICE OF ENFORCEMENT
AND COMPLIANCE
MONITORING

MEMORANDUM

SUBJECT: Issues #3(e) and #5 of the VOC Issue Resolution Process: Establishing Proof of VOC Emissions Violations, and Bubbles in Consent Decrees Resolving Civil Actions Under Section 113(b) of the Clean Air Act

FROM: Courtney M. Price
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TO: Regional Counsels
Regions I-X

Air Management Division Directors
Region I, III, V and IX

Air and Waste Management Division Director
Region II

Air, Pesticides, and Toxic Management Division Directors,
Region IV and VI

Air and Toxics Division Directors
Regions VII, VIII and X

In the attached memoranda, I am answering two questions that you identified as important issues in our Clean Air Act enforcement effort to reduce emissions of volatile organic compounds ("VOC"). Specifically, this guidance responds to issues #3(e), and #5 of the nineteen issues listed in a May 20, 1985 memorandum titled "Results of May 3 VOC meeting."

The issues addressed by this guidance concern how to establish proof of VOC emission violations (issue #3(e)) and the relationship between pending or potential bubble applications and consent decrees (issue 5). The main theme of the guidance on issue #3(e) is to encourage the use of Section 114 of the Clean Air Act to obtain information where data is not otherwise available to prove violations under the applicable test method. The principle point of the guidance on issue #5 is to emphasize that the current SIP governs until any am ments are fedc lly effectivc

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This guidance is part of an Agency-wide effort to address VOC enforcement issues and should be considered in conjunction with the responses to the other VOC issues, which will be distributed by the responsible EPA offices as they are developed.

One major comment regarding issue 3(e) was repeated by several commentors during the second round of review and is worth mentioning briefly here. The comments suggested that rather than attempting to fix recordkeeping problems through §114 requests, EPA should work towards incorporating better recordkeeping requirements in the state implementation plans. For example, EPA could issue SIP deficiency notices where the SIP does not provide for recordkeeping requirements adequate to determine if the source is in compliance with the SIP.

Our response to issue 3(e) is designed to deal with those interim problems concerning recordkeeping which arise prior to the resolution of the more fundamental concern of poorly drafted SIP recordkeeping requirements. The issue of how to improve the SIP's is being addressed by the Control Programs Development Division. The attached guidance is intended to advise you of the tools available to obtain better evidence of violations, and my office's policy concerning the use of those tools, until such time as they may become unnecessary because of corrective SIP revisions.

I appreciate the efforts of the Regions in commenting on the various drafts of the two following documents and hope that you find them helpful in resolving some of the issues concerning VOC enforcement.

Attachments

ISSUE NUMBER 3(e): How are VOC emissions to be calculated over a chosen averaging time when a company is not required to, or does not, maintain records directly pertinent to that unit of time?

RESPONSE: This issue is presented when the period for assessing compliance under the SIP with the VOC emission limitation (e.g., a source must meet a percent VOC limitation over a 24 hour period or instantaneously) does not correspond to the records maintained by the source (e.g., records of VOC usage are kept by the source only on a monthly basis). The issue is also presented in other contexts. For example, a SIP may require line-by-line compliance while the source records are maintained only on a plant wide basis. The issue is important because compliance determinations for many types of VOC sources rely upon the records of VOC usage kept by the individual company.

Where the SIP itself requires records to be maintained that correspond to the SIP emission limitations, corrective action can be taken under Section 113 of the Clean Air Act to require the source to keep the proper records. This action can consist of the issuance of an administrative order under Section 113(a), or the initiation of a judicial action under 113(b). The remainder of this memorandum addresses the situation where the SIP does not contain such a record keeping requirement.

There are four recommended techniques available to determine source compliance with VOC SIP emission limitations in the absence of a SIP record keeping requirement for source records which correspond to the SIP emission limitations. These four different techniques are primarily useful in four different contexts.

The first technique consists of the use of mathematical algorithms. A description of two different types of available algorithms is attached (attachment 1). Both apply various mathematical computations to monthly or yearly data to produce a figure representing the minimum number of days that a source had to be out of compliance with the SIP emission limit. This calculation is statistically based and does not identify the particular days that a source was in violation. Use of the algorithms may be helpful in settlement discussions with the source and in determining a settlement penalty.

Use of the results of the algorithms in a different context, to prove violations at a trial or hearing, presents several issues. Defendants can be expected to argue that the Government may prove violations only through the use of the appropriate test method, which would be the method specified

in the federally-approved SIP, or if there is none, the appropriate EPA test method in 40 CFR Part 60 (see 40 CFR §52.12(c)). To overcome this point, the Government would have to argue that violations can also be proven through expert opinion testimony under the Federal Rules of Evidence, Rule 702 (Testimony by Experts), 703 (Basis of Opinion Testimony by Experts), and 704 (Opinion on Ultimate Issue). In order to use the results of the algorithms as evidence of violations at a trial, the Government should be prepared to prove the statistical validity of the algorithms through expert testimony, and to show through the opinion of an expert, based upon the results of the algorithms, that the source had to be in violation for a given number of days. The Government would not be able to prove precisely which days a company was out of compliance nor which lines (or how many lines) were out of compliance. The Government would be able to show, based on the source's total VOC output and the restrictions provided in SIP, that at least one of the lines at the source was out of compliance for a certain minimum period of time. Sole reliance on algorithms has the negative effect of calculating violations on an averaging basis in what may be the absence of any SIP provision authorizing averaging.

Because of these potential issues of proof and the effect of averaging out some violations by using algorithms, steps should be taken to obtain the data necessary to calculate emissions under the applicable test method. Thus, the second recommended technique to determine source VOC compliance is to use Section 114 of the Clean Air Act to request currently existing source records which can be used to develop the data necessary to make compliance determinations under the applicable test method. Items such as sales slips, invoices, production records, solvent orders, etc., may be available and useful in developing the necessary data for the test method calculations. Once a case has been filed discovery can also be used to supplement the information obtained under Section 114.

The third recommended technique to determine source VOC current and future compliance is the issuance of a request under Section 114 requiring the source to prospectively keep the necessary records. This technique is the most straightforward of the three and the one that should generally be pursued. It may be the only option in the case where sources have not kept records in a form which can be used, directly or indirectly, to determine compliance under the applicable test method. It may also be the only realistic option where the use of existing records to develop the necessary data for the test method calculations would be unduly time-consuming and burdensome for the Agency.

Under the authority of Section 114, EPA may require a source to establish and maintain records reasonably required to determine compliance with the SIP (Section 114(a)(1)(A) and (B)). By issuing such a request, EPA would impose an obligation on a source to keep and maintain those records which are necessary to calculate compliance determinations under the applicable test method. The requested record keeping should be in a format consistent with the SIP emission requirements. Thus, if the SIP requires compliance on a line-by-line basis and on a 24 hour average, the records should be kept on the basis of individual lines using no more than 24 hour averaging. Also, the required measurements as to VOC content should be consistent with applicable EPA test methods. For example, EPA should require in the Section 114 request that data on the VOC content of a particular coating or ink is produced through a measuring process identical to EPA's method 24 or 24 A in 40 C.F.R. §60 App. A.

As a fourth technique, Section 114 may also be used to require a source to sample emissions in accordance with the methods prescribed by EPA (Section 114(a)(1)(D)). Thus, Section 114 may be used to require a source to conduct an emissions test in accordance with the applicable test methods. This type of Section 114 request would probably be the most appropriate where compliance determinations are made on the basis of emissions testing as opposed to an analysis of the VOC content of the individual coatings used. In certain situations where it is unclear whether the coating or ink supplier is using proper test methods, EPA may want to require the user of those coatings to run tests for VOC content using EPA's approved test methods.

In conclusion, algorithms exist and are available to estimate the minimum number of days a company was out of compliance with SIP VOC emission limitations in the absence of company records which are necessary to make compliance determinations under the applicable test method. The results of the algorithms are primarily useful for purposes of settlement discussions or for identifying sources which should be required to submit information under §114. While this guidance does not preclude using algorithms and expert opinion testimony to prove violations at a trial, the Government should be prepared to prove at least some days of violation through the applicable test method in the event that expert opinion evidence is rejected by the judge. The records necessary to develop this proof under the applicable test method can be sought through a Section 114 request for information where the company has data which can be used

to develop the necessary records. Such records can also be developed on a prospective basis through a requirement imposed under the authority of Section 114 requiring the source to maintain the necessary records. Finally, Section 114 can also be used to require source testing of emissions.

Future litigation reports based upon VOC SIP emission limitation violations should, if at all possible, either contain proof of violations using the applicable test method covering at least part of the period of time the source is alleged to be in violation of the emission limitation or should contain a cause of action based upon a source's failure to comply with a previous request issued under Section 114 for source records or testing. Prior to the referral of a report, the authority granted EPA under Section 114 should be used, where necessary, to obtain the data needed to establish some days of violation under the applicable test method. Through the use of Section 114, the Government should either have the evidence needed to prove specific violations, or, if a source fails to comply with the Section 114 request, a basis to proceed under Section 113(b)(4) for violation of Section 114. Litigation reports relying solely upon algorithms to evidence violations are appropriate only if, after diligent effort to obtain more detailed data, statistical proof through the use of algorithms remains the only available technique.

If you have any questions concerning this guidance, please contact Burton Gray at FTS 382-2868.

Courtney M. Price
Assistant Administrator

JAN 17 1986

ISSUE NUMBER 5: How Can EPA Include A Bubble In The Context Of A Consent Decree?

RESPONSE: EPA cannot endorse a consent decree which contains a schedule for compliance with a bubble until EPA has promulgated final approval of the particular bubble as a SIP revision (or until the bubble has been approved by the State if the bubble is granted under a generic bubble provision). This position is supported by existing Agency policy ("Guidance for Drafting Judicial Consent Decrees" issued on October 19, 1983), Section 113 of the Clean Air Act and case law.

A consent decree must require final compliance with the currently applicable SIP. The Agency's "Guidance For Drafting Judicial Consent Decrees," states that consent decrees must require final compliance with applicable statutes or regulations. Other than interim standards, a decree should not set a standard less stringent than that required by applicable law or regulation, because a decree is not a substitute for regulatory or statutory change. (See page 11 of the Guidance.)

Section 113(b)(2) of the Act, 42 U.S.C. 7413(b)(2), provides EPA with the authority to initiate civil actions to obtain injunctive relief to correct source violations of the SIP. A settlement of such an action must include a requirement to comply with the SIP provisions that formed the basis of the request for injunctive relief. The settlement cannot require final compliance with a provision not yet a part of the federally approved SIP.

Case law also supports the proposition that the SIP may only be changed through certain specific procedures and that absent those procedures, no change can be effected to the original SIP emission levels. Train v. Natural Resources Defense Council, 421 U.S. 60 (1975). The SIP, as approved through a formal mechanism by EPA, sets the official emission limits and remains the federally enforceable limit until changed. Ohio Environmental Council v. U.S. District Court, Southern District of Ohio, Eastern Division, 565 F.2d 393 (6th Cir. 1977).

A decree may contain a general provision recognizing that either party may petition the court to modify the decree if the relevant regulation is modified, as would be the case with a bubble. The following language is an example of such a reopener clause where EPA approval of the individual bubble is required.

> If EPA promulgates final approval of a revision to the applicable regulations under the State Implementation Plan, either party may, after the effective date of the revision, petition the Court for a modification of this decree.

If a federally approved generic procedure is applicable, the reopener clause should be modified to reflect the particular generic procedures.

If a SIP revision that affects a decree's compliance schedule is finally approved, decree language, as indicated above, may permit the source to petition the court for a modification of the schedule. A source is relieved from its obligation to meet the existing schedule only upon final approval by EPA, or by the state if under a federally approved generic bubble regulation, of the SIP revision and only upon a modification of the decree. The consent decree may not contain a clause which would automatically incorporate any future bubble.

It is important to note in the above context that consent decree compliance schedules must be as expeditious as practicable in terms of implementing a control strategy to achieve compliance with the existing SIP and may not add in extra time to provide for final EPA action on a request for a SIP revision. The "Guidance for Drafting Judicial Consent Decrees" states on page 12 that, "The decree should specify timetables or schedules for achieving compliance requiring the greatest degree of remedial action as quickly as possible." The concept of expeditiousness was taken from §113(d)(1) (applicable to compliance schedules in Delayed Compliance Orders) which was added to the Clean Air Act by the Amendments of 1977. The principle was incorporated into Agency guidance issued shortly after the 1977 amendments pertaining to compliance schedules in judicial consent decrees, e.g., "Enforcement Against Major Source Violators of Air and Water Acts" - April 11, 1978 (see pg. 4), and "Section 113(d) (12) of the Clean Air Act" - August 9, 1978 (see pg. 2).

If you have any questions concerning this guidance please contact Burton Gray of AED at FTS 382-2868.

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